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12 SIX4THREE, LLC, a Delaware
limited liability company
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14 SUPERIOR COURT OF CALIFORNIA
15 COUNTY OF SAN MATEO

16 SIX4THREE, LLC, a Delaware limited
liability company;

17 Plaintiff,
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19 v.

20 FACEBOOK, INC., a Delaware
corporation;
21 MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
22 JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
23 MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
24 DOES 1 through 50, inclusive,

25 Defendants.
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FILED
SAN MATEO COUNTY
APR 12 2019

Clerk of the Superior Court
DEPUTY CLERK

Case No. CIV 533328

Assigned for all purposes to
Hon. V. Raymond Swope, Dept.
23

**OPPOSITION TO FACEBOOK INC'S
EX PARTE APPLICATION FOR AN
ORDER SHORTENING TIME FOR
DEPOSITIONS**

Date: April 12, 2019

Time:

Filing Date: April 10, 2015

Trial Date: April 25, 2019

CIV533328

MPAO

Memorandum of Points and Authorities in Opp
1765093



5/3/2019

1 Counsel of record for Six4Three submits this brief response to Facebook's *Ex Parte* Application
2 for an Order Shortening Time for Depositions.

3 First, as the Court is aware, on April 10, 2019, counsel of record for Six4Three filed a Petition
4 for Peremptory Writ of Mandate, Prohibition or Other Appropriate Relief, and Request for Immediate
5 Stay, in the Court of Appeal of the State of California, First Appellate District. The petition seeks an
6 immediate stay of discovery in this action, specifically any orders of this Court that require counsel of
7 record to perform legal services on behalf of Six4Three, while their motions to be relieved as counsel
8 for Six4Three are under submission.

9 Facebook's *ex parte* application constitutes a further example of the harm caused by the delay in
10 ruling on counsels' motions to be relieved as counsel, thereby forcing conflicted counsel to take action
11 on Six4Three's behalf to avoid prejudicing Six4Three's rights. Accordingly, we respectfully request
12 that the Court take no action on Facebook's *ex parte* application until the Court of Appeals makes a
13 determination on counsels' petition for an immediate stay. Six4Three is entitled to representation by
14 unconflicted counsel in connection with this matter, and current counsel of record should not be forced
15 to provide representation that is prohibited by the rules of professional responsibility. The undersigned
16 are filing this opposition solely in order to preserve Six4Three's rights.

17 Second, the undersigned notes for the Court that the relief requested by Facebook in its
18 application with respect to searches to be performed by the forensic examiner risks violating the attorney-
19 client and work product privileges, and potentially other privileges. Facebook requests an order requiring
20 the forensic examiner to perform searches of Mr. Kramer's and Mr. Scaramellino's computers using a
21 proposed list of third-party e-mail domains. Insofar as Mr. Kramer and Mr. Scaramellino have not had
22 possession of their computers for months, these proposed searches will not reveal any recent
23 communications that Facebook cites as the basis for its application.

24 Furthermore, however, it is conceivable the searches proposed by Facebook will yield documents
25 protected by privilege. For example, a search for documents using the third-party email "guardian"
26 might yield a privileged communication (attorney-client and/or work product) between Six4Three and
27 counsel about a communication with the Guardian newspaper. Accordingly, if the Court is inclined to
28 grant Facebook's application, its order should provide that before any documents are provided to counsel

1 for Facebook, Six4Three should be given a sufficient opportunity to conduct a privilege review of any
2 documents responsive to the search terms so that any privileged documents can be segregated and
3 logged. Any disputes regarding such documents can be resolved by the Court if necessary. Such a
4 process is required to prevent waiver of privilege (including the work product privilege, which is not
5 waived by the crime-fraud exception to the attorney-client privilege.)

6 For the foregoing reasons, the undersigned counsel respectfully request that the Court defer
7 decision on Facebook's application while their request for an immediate stay of discovery is pending by
8 the Court of Appeals. Alternatively, if the Court is inclined to grant Facebook's application and order
9 the forensic examiner to perform searches, Six4Three should be given a sufficient opportunity to review
10 any resulting documents before they are produced to Facebook so that any privileged documents can be
11 logged.

12 Dated: April 12, 2019

Respectfully Submitted,

GROSS & KLEIN LLP

BIRNBAUM & GODKIN, LLP

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16 By: Joseph for Mr. Godkin
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17 David S. Godkin (admitted *pro hac vice*)
James E. Kruzer (admitted *pro hac vice*)

18 Attorneys for Plaintiff Six4Three, LLC

CERTIFICATE OF SERVICE

I, Jennifer Cuellar, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108.

On April 12, 2019, I served the following document(s) on the parties in the within action:

**OPPOSITION TO FACEBOOK INC'S EX PARTE APPLICATION FOR AN ORDER
SHORTENING TIME FOR DEPOSITIONS**

X	VIA HAND: The above-described document(s) will be placed in a sealed envelope which will be hand-delivered on this same date by _____, addressed as listed below.
	Superior Court of California County of San Mateo Department 23 400 County Center Redwood City, CA 94063
X	VIA E-MAIL: I attached the above-described document(s) to an e-mail message, and invoked the send command at approximately _____ AM/PM to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is jcuellar@mpbf.com

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Attorneys for Facebook, Inc.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing is
10 a true and correct statement and that this Certificate was executed on April 12, 2019.

11 By 
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Jennifer Cuelar